No. 20298

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN P. BUCK, Trustee, etc.,

Appellant,

vs.

OSCO SIMPSON, SR.,

Appellee.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

Jurisdiction.

This is an appeal from an order of the District Court dismissing contempt proceedings initiated against Osco Simpson, Sr. [1 Tr. 39][1] for failure to comply with an order of the Referee in Bankruptcy directing him to turnover $72,747.89 to appellant [1 Tr. 16]. On June 21, 1965, appellant filed a timely notice of appeal [1 Tr. 41]. The Court has jurisdiction of this appeal under section 24a of the Bankruptcy Act, 11 U.S.C. §47a.

Statement of the Case.

On September 9, 1964, while insolvent, Osco Simpson, Sr. ("appellee") sold his residence in Tuscaloosa, Alabama and received $72,747.89 in cash [1 Tr. 11] in small bills [1 Tr. 12]. Within a week, Simpson and his wife moved from Tuscaloosa, Alabama to Los Angeles,

[1]The transcript of the record in this court is in two volumes. References to the first volume are cited as "1 Tr."; references to the second volume are cited as "2 Tr.".

California [1 Tr. 12] without leaving any forwarding address [Ex. 4, p. 45].[2] On October 2, 1964, an involuntary petition in bankruptcy was filed in Alabama against Simpson, his two sons, and the three partnerships of which they were co-partners [1 Tr. 12]. John P. Buck ("appellant") was appointed receiver of each of the estates [1 Tr. 12-13]. On October 6, 1964, appellant took physical possession of those assets of the estates remaining in Alabama, but did not find any portion of the $72,747.89 [1 Tr. 13]. When Simpson was located in California, ancillary receivers of Simpson's estate were appointed by the United States District Court for the Southern District of California [1 Tr. 13]. On October 21, 1964 the ancillary receivers filed an application in the bankruptcy court to compel Simpson to turnover the $72,747.89 to them [1 Tr. 13-14]. Simpson filed an answer to the application in which he denied having possession of the money [1 Tr. 7] and on November 16 and 17, 1964, a trial on the application was held before the Referee in Bankruptcy [1 Tr. 16].

Simpson defended on the ground that he no longer was in possession of the funds. His written answer to the application admitted possession of the money in early September but alleged that the money was left in his office in Alabama when he and his wife moved to California [1 Tr. 7]. In support of this allegation Simpson testified that the money was deposited by him in a sack in an unlocked filing cabinet in his office in

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[2]The reporter's transcript of the proceedings before the Referee in Bankruptcy was received in evidence as Exhibits 3 and 4 by the District Judge at the contempt hearing on May 25, 1965 [2 Tr. 57-58]. The reporter's transcript of November 16, 1964 is hereinafter referred to as "Exhibit 3"; the reporter's transcript of November 17, 1965 is hereinafter referred to as "Exhibit 4".

Tuscaloosa, Alabama; that he told no one, including his wife and sons, where the money was placed; and that, as far as he knew, the money was still there [1 Tr. 14]. Appellant, then receiver and now trustee of Simpson's estate, testified that he searched the office and filing cabinet on October 6, 1964 and again on October 9, 1964, but found no trace of the money [1 Tr. 14-15].

The Referee in Bankruptcy gave no credence to Simpson's defense and granted the turnover order. In his oral opinion following two days of trial, the Referee concluded that "there is not one scintilla of doubt . . . that Mr. and Mrs. Simpson, on the date they departed from Alabama, had, in their possession, custody and control $72,747.89" [Ex. 4, p. 77]. The Referee characterized Simpson's testimony as "an explanation of the handling of this money which would not be plausible and explainable and acceptable by a child" [Ex. 4, p. 76]. After making his findings of fact and conclusions of law, the Referee entered his order compelling Simpson to turnover the funds to appellant [1 Tr. 16]. No petition for review or other appeal was taken from that order and it became final on December 12, 1964 [1 Tr. 25].

Appellant promptly initiated contempt proceedings when Simpson failed to comply with the turnover order. An order to show cause why appellee should not be held in contempt was issued and was returnable before the District Court [1 Tr. 22]. Although personally served, appellee did not make a personal appearance at the hearing before the District Judge on January 29, 1965, but was represented by counsel [2 Tr. 3]. The District Judge held Simpson in contempt for failure to comply with the turnover order [1 Tr. 35] and issued a bench warrant for his arrest [2 Tr. 11-12].

Pronouncement of judgment under the District Court's contempt order was set for February 8, 1965 at 10:00 A.M. [2 Tr. 16]. Appellant's counsel had a conflict in his court calendar and made arrangements with the District Judge's clerk to have sentencing delayed until counsel arrived [Affidavit in support of appellant's Petition for Writ of Prohibition and Mandate, on file with this Court in Case No. 19895]. Nevertheless, the matter was called "out of order" [2 Tr. 16] although the court was advised that appellant's counsel "was on his way" [2 Tr. 16]. After inquiring what Simpson was "going to do about payment of the fine", the District Judge, on the basis of the report "that Mr. Simpson stated he didn't have any money" [2 Tr. 17], set aside the contempt order stating: "The attorney doesn't have enough interest to be here on time or notify us. So I will discharge him of contempt" [2 Tr. 17, 1 Tr. 36].

Pursuant to appellant's petition for prohibition and mandate, this Court, on April 12, 1965, reversed both the District Judge's order holding appellee in contempt and the order discharging appellee from contempt, and remanded the cause to the District Court [1 Tr. 37].

The remanded cause was set for hearing by the District Court on May 5, 1965 [2 Tr. 21]. Appellant, in support of the contempt order, introduced into evidence the Referee's findings of fact and turnover order, and rested [2 Tr. 21-22]. Simpson's counsel reported that Simpson was not present in court but that he relied on the same explanation made before the Referee "that the monies were in a file in his place of business back in Alabama and . . . he has no personal ability to pay"

[2 Tr. 23], and that "the whole case simply turns on whether or not the court believes [Simpson's] testimony" [2 Tr. 24]. Appellee introduced no evidence and the court took the matter "under submission . . . [to] write a memorandum " [2 Tr. 34]. Five days later, the court *sua sponte* set the matter down for further hearing on May 25, 1965 [1 Tr. 38].

Osco Simpson took the stand at the continued contempt hearing and repeated the testimony given before the Referee. After denying possession of or control over any portion of the $72,000 [2 Tr. 38] Simpson, over appellant's objection, was permitted to testify concerning factual issues decided by the Referee because the court was "more or less trying the matter over again here" [2 Tr. 41]. Simpson testified, as he had before, that he put the sack containing $72,000 in his business office in Alabama shortly before leaving for California and had not seen or heard of the money since [2 Tr. 41-53]. Appellant cross-examined Simpson, introduced into evidence the transcripts of the testimony before the Referee [2 Tr. 58], and the court took the matter under submission [2 Tr. 65].

On May 27, 1965 the District Judge entered his written order adjudging Osco Simpson not in contempt of court because he was presently unable to comply with the turnover order [1 Tr. 39]. This appeal followed.

Specification of Error.

The District Court erred in not holding appellee in civil contempt for failure to comply with the Referee in Bankruptcy's turnover order and in not committing appellee until he purged himself of contempt.

Summary of Argument.

The turnover proceedings before the Referee in Bankruptcy resulted in findings of fact and a final order that were not subject to collateral attack in the contempt proceedings. Turnover proceedings are an integral part of bankruptcy administration and they are enforceable through the District Judge's civil contempt powers. The turnover proceeding is separate and distinct from the contempt proceeding, and when concluded by a final order, the turnover order is *res judicata* and cannot be collaterally attacked in the contempt proceeding. A final turnover order was entered, it prevented appellee from relitigating his explanation of the disappearance of the money, and the District Court erred in receiving such testimony into evidence in the contempt proceeding.

The District Court's finding that appellee could not comply with the turnover order at the time of the contempt proceeding was clearly erroneous. The District Court's finding was based on appellee's defense that the money was left in Alabama when he moved to California. This explanation had been offered once and rejected by the Referee, a finding clearly commanded by the evidence. The Referee's findings were *res judicata* and appellee's testimony was inadmissible. The District Judge obviously based his finding of "present inability to comply" on his belief in appellee's explanation. The District Court's order was thus based wholly upon a finding as to appellee's credibility which in turn was founded on inadmissible evidence. The finding was clearly erroneous and should be reversed.

ARGUMENT.

I.

The Referee's Findings of Fact That Appellee Had $72,000 in His Possession at the Time of the Turnover Proceeding Were Res Judicata and Could Not Be Collaterally Attacked in the Contempt Proceeding.

Judicially fashioned, the turnover proceeding has become an integral part of bankruptcy administration. Vested with title to all of the bankrupt's assets as of the date of the filing of the petition in bankruptcy, 11 U.S.C. §110a, the trustee has the statutory duty to collect that property for the benefit of the estate. 11 U.S.C. §75a. To prevent recalcitrant bankrupts from thwarting the trustee's collection of assets, the "courts of bankruptcy have fashioned the summary turnover procedure as one necessary to accomplish their function of administration". *Maggio v. Zeitz,* 333 U.S. 56, 62-63 (1948).

If disobeyed, civil contempt powers are conferred upon the courts of bankruptcy to enforce the turnover orders. Two separate provisions of the Bankruptcy Act authorize such proceedings. Section 2a(13) empowers any court of bankruptcy to "enforce obedience by persons to all lawful orders, by fine or imprisonment or fine and imprisonment". 11 U.S.C. §11a(13). This section creates the civil powers to coerce obedience to the bankruptcy court's orders. *Maggio v. Zeitz, supra,* 333 U.S. at 67. A second provision of the Bankruptcy Act, Section 41b, empowers the district judge to conduct a summary proceeding concerning any alleged disobedience to the referee's order and to commit the contemner if the facts so warrant. 11 U.S.C. §69b.

The contempt proceeding is separate and distinct from the turnover proceeding. The sole purpose of the contempt proceeding is to coerce obedience to the turnover order. The decisive character of civil contempt is incarceration for enforcement purposes, and it leaves the contemner to carry the keys of the prison in his own pocket. *Penfield Co. of California v. Securities & Exch. Com'n,* 330 U.S. 585 (1947).

Thus, when the turnover proceeding is concluded by a final order, "it becomes res judicata and not subject to collateral attack in the contempt proceedings." *Maggio v. Zeitz, supra,* 333 U.S. at 68; *Oriel v. Russell,* 278 U.S. 358 (1929). The district judge cannot permit the contemner to subvert the contempt proceeding into a "reconsideration of the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy." *Maggio v. Zeitz, supra,* 333 U.S. at 69. The courts have cautioned that every effort should be made to issue turnover orders "only when it appears that obedience is within the power of the party being coerced by the order. *But when it has become final, disobedience cannot be justified by re-trying the issues as to whether the order should have issued in the first place* [emphasis added]." *Maggio v. Zeitz, supra,* 333 U.S. at 69. This rule is well settled. See, 2 *Collier on Bankruptcy* (14th ed.) ¶23.10 [4], p. 581.

There is no question but that the Referee's findings in the turnover proceeding were *res judicata* and could not be collaterally attacked in the contempt proceeding. The Referee's findings of fact, conclusions of law and turnover order were entered December 2, 1964 [1 Tr. 10]. *No petition for review or other appeal was*

taken from that order [1 Tr. 25] and it became final ten days later. 11 U.S.C. §67c.

Conclusively established by that proceeding were two facts: Simpson, contrary to his contention, had possession of the money at the time of the turnover proceeding; and, contrary to Simpson's contention, he did not leave the money in a filing cabinet in his office in Alabama. Each of these facts were at issue in the turnover proceeding. Appellant's application for an order compelling Simpson to turnover the funds alleged that the cash was still in his possession or control [1 Tr. 5]. Simpson's answer admitted "that in the early part of September 1964 he did have possession of a sack of money believed by him to be approximately $72,000", but alleged that Simpson "put said money in a file in an office at 1016 Bridge Avenue, Northpork [sic], Alabama" and that he "has no present knowledge of whether or not the money is still located in Alabama" [1 Tr. 7]. Appellant's evidence established that although Simpson received $72,747.89 in cash in twenty, ten and five dollar bills on September 9, 1964 [1 Tr. 12], he had refused to turnover the money to his receivers in bankruptcy [1 Tr. 14]. Admitting receipt of the money [Ex. 3, p. 14], Simpson defended by simply stating that he put the money in a filing cabinet in his office in Northport, Alabama shortly before leaving for Los Angeles [Ex. 3, pp. 17-19], that he did not know the present whereabouts of the money sack [Ex. 3, p. 35], and that he would be able to produce the money if it still was in the file [Ex. 3, p. 38]. The Referee branded Simpson's explanation as one that would not be accepted by a child [Ex. 4, p. 76] and found that Simpson had possession or control of the money [1 Tr. 14-15]. Accordingly, the Referee entered his order compelling

Simpson to turnover the money to appellant [1 Tr. 16].

Contrary to *Maggio's* clear command that the findings of fact in the turnover proceeding are *res judicata* and "cannot be relitigated or corrected in a subsequent contempt proceeding", *Maggio v. Zeitz, supra,* 333 U.S. at 70, the contempt proceeding resulted in a re-trial of the very issues that were the subject of the turnover proceeding. After appellant introduced into evidence the Referee's findings of fact and turnover order [2 Tr. 21-22], the District Judge permitted Simpson to testify, over appellant's objections [2 Tr. 41, 46], that he put the $72,000 in a filing cabinet in Alabama before leaving for California [2 Tr. 41-42] and that he had never seen the money again [2 Tr. 44]. This was the same excuse propounded before the Referee in Bankruptcy but which the Referee refused to believe. Although appellant's objections referred the Court to *Maggio v. Zeitz, supra,* the evidence was admitted "to find out where the money went" even though the District Judge "realize[d] that ruling isn't in the law books" [2 Tr. 46]. The District Court's trial *de novo* of Simpson's defense to the turnover application was clear error.

II.

The District Court's Finding That Appellee Was Unable to Comply With the Referee's Turnover Order Was Clearly Erroneous and Should Be Reversed.

Unlike this Court's scope of review in most matters, appeals from proceedings or controversies in bankruptcy extend to both the law and the facts. With respect to orders of a court of bankruptcy, Section 24a of the Bankruptcy Act charges the appellate courts with the

duty "to review, affirm, revise, or reverse, both in matters of law and in matters of fact", except for judgments rendered on a jury verdict. 11 U.S.C. §47a. It is clear that a civil contempt proceeding is a proceeding or controversy within the meaning of Section 24 making both matters of law and matters of fact reviewable. 2 *Collier on Bankruptcy* (14th ed.) ¶ 24.22, p. 751. Because of Section 24, the applicability of the "clearly erroneous" test of Rule 52(a) of the Federal Rules of Civil Procedure to bankruptcy appeals is disputed. 2 *Collier on Bankruptcy* (14 Ed.) ¶ 25.30, pp. 973-974.

Whether the "clearly erroneous" test or some other test is applied, findings "dependent upon oral testimony where the candor and credibility of witnesses would best be judged" are entitled to great weight on appeal. *United States v. United States Gypsum Co.,* 333 U.S. 364, 395 (1948). The test is generally whether "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed". *United States v. United States Gypsum Co., supra,* 333 U.S. at 395. The crux of the inquiry was succinctly stated by Judge Learned Hand in *United States v. Aluminum Co. of America,* 148 F. 2d 416, 433 (2d Cir. 1945):

> "It is idle to try to define the meaning of the phrase 'clearly erroneous'; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the finding of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded."

And in being "well persuaded", the courts have rarely set aside findings based upon demeanor testimony where

credibility is involved. *Grace Bros. v. Commissioner of Internal Revenue,* 173 F. 2d 170, 174 (9th Cir. 1949); 5 *Moore's Federal Practice* (2d ed.) ¶52.03[1], p. 2615. These same principles are applicable to the findings of a referee in bankruptcy. *Costello v. Fazio,* 256 F. 2d 903, 908 (9th Cir. 1958); *In re Gordon & Gelberg,* 69 F. 2d 81 (2d Cir. 1934); 2 *Collier on Bankruptcy* (14th ed.) ¶39.28, p. 1518.

When an appeal results from a district court's order setting aside the findings of a referee in bankruptcy, it is the referee's findings, and not those of the district court, that are before the appellate court. *The Morris Plan Industrial Bank v. Henderson,* 131 F. 2d 975 (2d Cir. 1942). Even though the reviewing judge makes findings on review expressly contrary to those of the referee, the judge's findings are not before the appellate court. *Hoppe v. Rittenhouse,* 279 F. 2d 3 (9th Cir. 1960); *The Morris Plan Industrial Bank v. Henderson, supra* (2d Cir. 1942); *Phillips v. Baker,* 165 F. 2d 578 (5th Cir. 1948); *In re Lurie Bros., Inc.,* 267 F. 2d 33 (7th Cir. 1959); *O'Rieley v. Endicott-Johnson Corporation,* 297 F. 2d 1 (8th Cir. 1958); *Potucek v. Cordeleria Lourdes,* 310 F. 2d 527 (10th Cir. 1962).

Had Osco Simpson directly attacked the turnover order he would have had the burden of overturning the Referee's findings of fact. He would have had to establish with this Court a "firm conviction that a mistake had been committed", *United States v. United States Gypsym Co., supra,* 333 U.S. at 395, by the Referee when he found that Simpson had the money all the time and that Simpson fabricated his tale of the money in the unlocked filing cabinet.

Simpson could have directed this Court to nothing more in the record than his own protestations that he did not have the money when he left Alabama. His defense was simple. He sold his home, he stated, to pay off two or three federal tax liens [Ex. 3, p. 31]. After cashing the buyer's check for $72,747, and while alone, he put the money in a filing cabinet in his office in Northport, Alabama [Ex. 3, p. 31]. Within a week, he and his wife left for California because "we didn't have any work, and I thought I would just come out here and rest up a while, and shop around and see how the work was out here, and maybe stay out here quite a while" [Ex. 3, p. 32]. He did not have the money in his possession and did not know its whereabouts, he testified, but he had no objection to appellant taking possession of it [Ex. 3, p. 35]. When asked by his counsel to explain why he put the sack of money in the file in his office, Simpson casually replied): "Well, we sold the home and we didn't have anywhere else, and I thought it would be just as safe to put it there as anywhere else" [Ex. 3, pp. 36-37]. With this testimony, Simpson rested his defense [Ex. 3, p. 38], except for cross-examination of appellant's witnesses.

Appellant, on the other hand, would have directed this Court to the overwhelming evidence that led the Referee to reject Simpson's defense. Simpson and his two sons were partners in the Simpson Plastering Company, the Northport Building Supply, and the Stardust Supper Club. In addition, Simpson owned outright the Bridge Avenue Package Store [Ex. 4, pp. 19-20]. Each of the partnerships and Simpson himself maintained regular checking accounts in Tuscaloosa banks [Ex. 4, pp. 4-14]. The partnerships and Simpson became in-

solvent [Ex. 4, pp. 23-24] and Simpson decided to sell his house, for which he was asking about $200,000 [Ex. 4, p. 36]. After turning down an offer of $200,000, from which he would have received $40,000 to $50,000 cash and the balance of his equity over a five to ten year period [Ex. 4, p. 38], Simpson accepted an offer $75,000 below his asking price and $75,000 below the previous offer [Ex. 4, p. 37]. He took about $72,000 in cash for his equity of $150,000 [Ex. 4, p. 40] because he wanted an all cash sale [Ex. 4, pp. 43-44]. When he received the check for the purchase price on September 9, 1964, Simpson immediately took it to a Tuscaloosa, Alabama bank, refused a cashiers check in exchange [Ex. 3, p. 5], demanded that he be paid in cash, and walked out of the bank with $72,747 in five, ten and twenty dollar bills [Ex. 3, p. 5].

September 9, 1964 was the last day any portion of the $72,747 was seen by anyone other than Simpson. Appellant, on October 6, 1964, took possession of all of the Simpsons' property, including the filing cabinet where the money was supposed to be, but did not then or thereafter find the money [Ex. 3, pp. 45-46].

Called to the witness stand by appellant's counsel, Simpson "traced" the course of the missing money from the time he left the bank until the date of trial. Conveniently Simpson's testimony could never be contradicted by direct evidence. Simpson testified he took the money home and a couple of days later removed it to his office [Ex. 3, pp. 17-19]. No one was with him, he testified, when he moved the money to the office [Ex. 3, p. 73] and he told no one, including his wife and sons, where he had placed the money

[Ex. 3, p. 29]. That was the last Simpson allegedly knew of the money. Within a few days Simpson and his wife surreptitiously moved to California leaving no forwarding address [Ex. 4, p. 45]. Although Simpson telephoned his sons in Alabama after arriving in California, he did not ask them to check on the money [Ex. 4, p. 47]. Simpson's two sons themselves moved to California in October, driving two new automobiles [Ex. 4, pp. 50-54]. They were assisted, appellee's wife testified, by $2,900 cash that she deposited in a California bank on her arrival here but which she withdrew and mailed in cash to the sons [Ex. 4, pp. 59-62].

No reasonable man could have become "well persuaded" by this record that the Referee had made a mistake in finding Simpson had the money at the time of the turnover proceeding. The issue would have been essentially as framed by the Referee at the conclusion of the trial [Ex. 4, p. 75]:

> "The question is this: is it plausible that a man with a bank account and with his experience, who has had such extensive banking experience and business experience and who was so deeply involved as early as June, 1964, has discussed his legal complications and his financial difficulties with lawyers, and where a State Court action has been filed for the appointment of a Receiver, and, on the eve of his departure from Tuscaloosa, Alabama, for Los Angeles, California, would take $72,000.00 and put it in a sack, and put that sack in a filing cabinet and leave it in Alabama, where he and his wife departed from for the State of California under the harassed circumstances which were prevalent at the time of his departure."

The question could hardly have been resolved in any manner other than as resolved by the Referee [Ex. 4, pp. 76-77]:

> "We have here an explanation of the handling of this money which would not be plausible and explainable and acceptable by a child [much less] a mature man—a person who has practiced law for thirty-five years before going on the bench, and being on the bench approximately ten years, and who is familiar with human nature and who has had a chance to see and hear and listen and observe the testimony and demeanor and the conduct of Mr. and Mrs. Simpson. There is not one scintilla of doubt in this Court's mind that Mr. and Mrs. Simpson, on the date that they departed from Alabama, had, in their possession, custody and control, $72,747.89."

The Referee's findings of fact and the turnover order certainly would have been affirmed.

But the validity of the Referee's findings and turnover order are not the issues before this Court. At issue is the validity of the District Court's order discharging the contempt proceeding based upon his finding of May 27, 1965 that Osco Simpson "is presently unable to comply" with the turnover order [2 Tr. 39].[3] It is this finding which is now before the Court, and it is this finding which appellant claims is clearley erroneous.

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[3]The District Court did not make the special findings of fact contemplated by Rule 52(a) of the Federal Rules of Civil Procedure. Although failure to make such findings may constitute error, the cause need not be remanded if a full understanding of the question presented may be had without the aid of separate findings. *Shellman v. Shellman*, 95 F. 2d 108 (D.C. Cir. 1938). See, 5 *Moore's Federal Practice* (2d ed.), ¶52.06 [2], p. 2663.

And the District Court's finding of "present inability to comply", tested by any standard, should be reversed. Further inquiry into the credibility of Simpson's explanation that he left the money in Alabama was foreclosed by *Maggio,* and any evidence in support of this defense was inadmissible. This explanation had been offered once, rejected and could not be collaterally attacked. *In re Lawrence Carpet Co.,* 122 F. Supp. 912 (S.D. N.Y. 1954). Support for the District Court's finding must then come from the other evidence offered by Simpson. But aside from testimony as to his present earning capacity and standard of living [2 Tr. 38-40], and his statement that if he now had the money he would turn it over to the court [2 Tr. 45], Simpson offered no other evidence [2 Tr. 40-45]. Little weight could have been given such testimony. *In re Sussman,* 85 F. Supp. 570 (S.D. N.Y. 1949).[4] See, *Sahn v. Pagano,* 302 F. 2d 629 (2d Cir. 1962). The District Court's finding undoubtedly was based upon his belief in Simpson's

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[4]In granting the trustee's application to enforce the referee's order by civil contempt, the court in *In re Sussman,* 85 F. Supp. 570 (S.D. N.Y. 1949), commented on the weight to be given such evidence [85 F. Supp. at 572]:

> "Even assuming as true the bankrupt's story as to his very modest manner of living and of his borrowings and other methods of obtaining money in order to support himself and his wife for the year 1947, still I cannot accept that defense here as a full and complete exculpation. I must consider all the evidence. I cannot leave out of my mind the judicial determination that three or four months before October 28, 1947 bankrupt had in his possession and control the sum of $23,000 of the assets of the estate. The time element here is quite important.
>
> "His explanation of his inability to turn over the money is not sufficient. Of course, it is natural to presume that any one who evidences no indicia of affluence is not possessed of it. But it is also natural that one who must have known that he would be called upon to explain the loss or disappearance of a substantial sum of money would not likely exhibit signs of affluence."

explanation that he left the money in the filing cabinet in Alabama, and nothing else. This was Simpson's sole defense at both the February 8th [2 Tr. 17] and May 5th contempt hearings [2 Tr. 23], and it was the only "evidence" the District Judge relied upon when he vacated his contempt order on February 8th. The order dismissing the contempt proceeding was "based wholly on the finding as to [a party's] credibility which in turn was founded on consideration of inadmissible evidence", and must be reversed. *Smallfield v. Home Insurance Company of New York,* 244 F. 2d 337 (9th Cir. 1957).

Conclusion.

For the foregoing reasons, the order of the District Court adjudging appellee not in contempt of court should be reversed and appellee should be committed until such time as he purges himself of contempt.

Respectfully submitted,

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By J. RONALD TROST,
Attorneys for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. Ronald Trost

APPENDIX.

Identification of Exhibits as Required by Rule 18(f) of the Rules of the United States Court of Appeal—Ninth Circuit.

Exhibit No.	Identified	Offered	Received
1	2 Tr. 21	2 Tr. 21	2 Tr. 22
2	2 Tr. 21	2 Tr. 21	2 Tr. 22
3	2 Tr. 57	2 Tr. 57	2 Tr. 58
4	2 Tr. 57	2 Tr. 57	2 Tr. 58
Exhibits introduced in trial before Referee	2 Tr. 58-59	2 Tr. 58	2 Tr. 59 (by Reference)